Gan Eng San & Anor v Alliance Investment Bank & Ors

HIGH COURT (KUALA LUMPUR) — ORIGINATING SUMMONS NO D-24NCC-55 OF 2009
HAMID SULTAN J
9 NOVEMBER 2009

Banking — Security for advances — Charge — Guarantor's equity of redemption — Shares pledged by borrower as security for advances — Exercise by guarantor of right under guarantee to purchase or redeem shares — Whether permissible as of right without full satisfaction of debt due and owing to lender — Whether securities redeemable at market value

The first defendant was the lender and the second defendant was the principal borrower who had pledged 51% of its shareholding in the third defendant as security. The plaintiffs had guaranteed the repayment of the debt. The plaintiffs were not shareholders of the three defendant but were only directors. The minority shareholders of the third defendant were calling an EGM to remove the plaintiffs as directors. In consequence the purchase of the 51% shares was important to the plaintiff to control the third defendant as the second defendant had already been wound up. The plaintiff tendered a sum to the first defendant purportedly in their exercise of their right under the guarantee to purchase or redeem the shares. The defendant claimed that this was not permissible in law as of right without the full satisfaction of the debt due and owing to the first defendant. The plaintiffs filed this suit seeking a declaration relating to the deed of guarantee and indemnity executed by them in favour of the first defendant. The issue arising for determination was whether a guarantor has the right only to purchase the securities with other third parties or does this guarantee by the other terms of the guarantee and his status entitle to redeem the securities at the market value.

Held, dismissing the claim with parties to bear their own costs:

(1) The plaintiffs were entitled to compel the first defendant to allow the plaintiff to purchase or redeem the shares provided they were prepared to pay all the sums due and owing pursuant to the deed of indemnity and guarantee (see para 6(a)).

(2) The equity of redemption applies to all the interested parties in the security, including even the guarantors. It all depends on the facts and provision of the respective agreements (see para 6(b)).

(3) In law and as per the agreed terms the plaintiffs did not have an unqualified right to purchase or redeem the pledged shares at the redemption price or exercise the rights through a third party purchaser without having paid the entire debt guaranteed by them to the first defendant. However, if the first defendant and/or the liquidator of second defendant unreasonably refused, the law or equity may assist the plaintiff to evade liability and/or sue the first and/or the liquidator of the second defendant for damages arising from it inequitable conduct etc (if any) (see para 7).

[Bahasa Malaysia summary

Defendan pertama adalah pemberi pinjaman dan defendan kedua adalah peminjam utama yang telah menjamin 51% pemilikan sahamnya dalam defendan ketiga sebagai cagaran. Plaintif-plaintif telah menjamin pembayaran balik hutang tersebut. Plaintif-plaintif bukanlah pemegang saham defendan ketiga tetapi hanyalah pengarah-pengarah. Pemegang saham minoriti defendan ketiga memanggil satu EGM bagi memecat plaintif-plaintif sebagai pengarah-pengarah. Oleh sebab itu pembelian 51% saham-saham tersebut adalah penting untuk plaintif-plaintif bagi mengawal defendan ketiga kerana defendan kedua telah pun digulungkan. Plaintif menawarkan sejumlah wang kepada defendan pertama dalam menggunakan hak di bawah jaminan tersebut untuk membeli atau menebus saham-saham itu. Defendan mendakwa bahawa perkara tersebut tidak dibenarkan di bawah undang-undang sebagai satu hak tanpa membayar keseluruhan wang yang terhutang dan terbayar kepada defendan pertama. Plaintif-plaintif memfailkan guaman ini memohon satu deklarasi berkaitan surat ikatan jaminan dan indemniti yang ditandatangani oleh mereka yang berpihak kepada defendan pertama. Isu yang timbul untuk penentuan adalah sama ada seorang penjamin mempunyai hak hanya untuk membeli cagaran-cagaran tersebut dengan pihak ketiga yang lain, ataupun adakah jaminan menerusi syarat-syarat lain jaminan tersebut dan status penjamin memberi hak untuk menebus cagaran-cagaran tersebut pada nilai pasaran.

Diputuskan, menolak tuntutan dengan kos ditanggung oleh pihak-pihak sendiri:

(1) Plaintif-plaintif berhak memaksa defendan pertama bagi membenarkan plaintif-plaintif untuk membeli atau menebus saham-saham itu asalkan mereka sedia untuk membayar keseluruhan jumlah yang terhutang dan terbayar di bawah surat ikatan indemniti dan jaminan tersebut (lihat perenggan 6(a)).

(2) Ekuiti penebusan boleh dipakai oleh semua pihak yang berkepentingan dalam cagaran tersebut, termasuk juga penjamin-penjamin. Semuanya bergantung pada fakta-fakta dan peruntukan perjanjian masing-masing (lihat perenggan 6(b)).

(3) Dalam undang-undang dan seperti terma-terma yang dipersetujui plaintif-plaintif tidak mempunyai suatu hak tidak bersyarat untuk membeli atau menebus saham-saham yang dicagarkan tersebut pada harga penebusan atau melaksanakan hak-hak itu menerusi pembeli pihak ketiga tanpa membayar keseluruhan hutang yang dijamin oleh mereka kepada defendan pertama. Walaubagaimanapun, jika defendan pertama dan/atau likuidator defendan kedua dengan tidak munasabah enggan berbuat demikian, undang-undang atau ekuiti boleh membantu plaintif-plaintif bagi mengelakkan liabiliti dan/atau menyaman defendan pertama dan/atau likuidator defendan kedua untuk kerugian-kerugian yang berbangkit daripada tindakannya yang tidak adil dan lain-lain (jika ada) (lihat perenggan 7).]

Notes

For cases on charge, see 1 *Mallal's Digest* (4th Ed, 2005 Reissue) paras 2105–2127.

Cases referred to

AM Securities Sdn Bhd & Anor v Zulkefli Abdul Hamid [2008] 1 LNS 354, HC (refd)

Amanah Merchant Bank Bhd v Sumikin Bussan Kaisha Ltd [1992] 2 MLJ 832, HC (refd)

Bank Bumiputra Malaysia Bhd v Tiong Hua Kuong & Anor [2008] 1 LNS 261, HC (refd)

Bank of East Asia Ltd, The v Mody Sonal M & Ors [2004] 4 SLR 113, HC (refd)

China and South Sea Bank Ltd v Tan Soon Gin [1990] 2 WLR 56, PC (refd)

Fletcher Organisation Pty Ltd v Crocus Investment Pty Ltd [1988] 2 QdR 517, SC (refd)

Kwong Yik Bank Bhd v Transbuilder Sdn Bhd & Ors [1989] 2 MLJ 301, HC (refd)

Maplelee Property Sdn Bhd v Tan Lei Fon [2005] 3 MLJ 305; [2005] 1 CLJ 599, CA (refd)

Ong Eng Bing & Anor v Indian Overseas Bank [1983] 1 MLJ 193; [1982-1983] SLR 132, CA (folld)

Oriental Wealth (M) Sdn Bhd v RHB Bank Bhd & Ors [1998] 1 LNS 459, HC (refd)

Orix Credit Malaysia Sdn Bhd v M/s Belquip Sdn Bhd & Ors [2007] 3 MLJ 478 (folld)

Perwira Habib Bank Malaysia Bhd v Lum Choon Realty Sdn Bhd [2006] 5 MLJ 21; [2005] 4 CLJ 345, FC (folld)
Tengku Farid bin Tunku Hussain & Ors v United Asian Bank Bhd [1988] 2 MLJ 199, SC (refd)
Torita Rubber Works Sdn Bhd v Chew Chong Eu [2009] 5 MLJ 208; [2009] 9 CLJ 280, HC (refd)
Wong Ai Sung v Orix Credit Malaysia Sdn Bhd [2007] 5 MLJ 39; [2007] 4 CLJ 52, HC (folld)

Legislation referred to

Contracts Act 1950

Murthi (Chambers of Murthi & Partners) for the plaintiffs.
Haryaty Ibrahim (PM Tan Yaty Chin) for the first and fourth defendants.
James Chow (Chow Kok Leong & Co) for the second defendant.

Hamid Sultan J:

[1] This is my judgment in respect of the plaintiffs' originating summons encl 1, seeking declaration relating to the deed of guarantee and indemnity executed by them in favour of the first defendant. The said prayers read as follows:

(a) A declaration that by the true construction of the loan facility agreement dated 3 January 2003 between CS Metal Industries (M) Sdn Bhd (No 180133-X) and Alliance Merchant Bank Bhd (No 21605-D) (now known as Alliance Investment Bank), the memorandum of deposit of shares dated 3 January 2003 between CS Metal Industries (M) Sdn Bhd and Alliance Merchant Bank Bhd and the deed of guarantee and indemnity dated 30 December 2002 issued by the plaintiffs herein in favour of the first defendant, the plaintiffs are entitled pursuant to the said deed of guarantee and indemnity read together with the said memorandum of deposit of shares to compel the first defendant as the lender and holder of securities to permit the plaintiffs to discharge by purchase or redemption the unlisted charge shares numbering 2,907,000 units in CS Opto Semiconductors Sdn Bhd (the third defendant) and hold the same in subrogation of the rights of the first defendant thereof.

(b) Consequent thereto an injunction be issued directing the fourth defendant to execute and issue in the name of the first plaintiff an instrument of proxy under art 76 of the articles of the third defendant to each and every meeting of the members of the company to the held after the date of filing this action until the transfer and registration of the 2,907,000 shares in the joint name of the plaintiffs or otherwise as agreed by the plaintiffs.

(c) That provision be made for the costs of this action.

(d) This summons is grounded on the affidavit of Gan Eng San affirmed on and filed herein.

[2] The third defendant has no objection to the above prayers but other defendants are resisting the application. Parties have agreed it is sufficient for the disposal of encl 1 to decide as a question of law the following issue namely:

> Does the guarantor has the right only to purchase the securities with other third parties or does this guarantee by the other terms of the guarantee and his status entitle to redeem the securities at the market value.

[3] The plaintiffs having framed the question of law with the consent of the defendants heavily relies on the submission relating to the status as the principal debtor and not as guarantor. And that part of the submission reads as follows:

(a) In summary, a guarantor if by contract between the banker and the guarantor is elevated to the status of a principal debtor, this is not a fiction. The guarantor loses all the rights of the guarantor but in equity acquires the rights as the principal debtor, in parity with the principal debtor borrower. This is what we call in the words of Justice Shankar 'primary and parallel obligations and not collateral' and primary and parallel cannot be only in terms of liability as equity will intervene and vest primary and parallel rights on to the shoulders of the guarantors-principal debtor who loses all his guarantor protection upon assumption of the status of the principal debtor. Finally, this status is not a fiction but a reality as held by the Kuching High Court.

(b) If the submission of the plaintiff that the guarantor turned principal debtor not only have primary and parallel obligation but in equity has also primary and parallel rights, therefore it follows that the first defendant has a parallel right of redemption just as the borrower-principal debtor has.

(c) To sum up, hitherto the banking institutions have thrown the principal debtor clause at all the guarantors to enhance and burden them with primary and parallel obligation in line with the borrower-principal debtor status. Now for the first time, the tables are turned. The guarantor-indemnifiers turned principal debtor is now lawfully claiming what was in equity his rights, the equal rights in parity to the with the principal debtor. What is sauce for the goose is also sauce for the gander.

(d) Accordingly the plaintiffs' respectfully submits that by virtue of the status as guarantor tuned indemnifier turned principal debtor, they have a primary and parallel right to redeem the 2,907,000 shares presently held by the fourth defendant nominee bank and the creditor has no right of rejection.

[4] And relies on the following cases. (a) *Wong Ai Sung v Orix Credit Malaysia Sdn Bhd* [2007] 5 MLJ 39 at p 52; (b) *China and South Sea Bank Ltd v Tan Soon Gin* [1990] 2 WLR 56 at p 59; (c) *Tengku Farid bin Tunku Hussain & Ors v United Asian Bank Bhd* [1985] 2 MLJ 199 at p 200; (d) *Kwong Yik Bank Bhd v Transbuilder Sdn Bhd & Ors* [1989] 2 MLJ 301; (e) Queensland's Supreme Court in the case of the *Fletcher Organisation Pty Ltd v Crocus Investment Pty Ltd* [1988] 2 QdR 517 at pp 542–543; (f) *Bank Bumiputra Malaysia Bhd v Tiong Hua Kuong & Anor* [2008] 1 LNS 261.

BRIEF FACTS

[5] The first defendant is the lender. The second defendant is the principal borrower, and had pledged 51% of its shareholding in the third defendant as security. And in addition the plaintiffs had guaranteed the repayment of the debt. The plaintiffs are not shareholders of the third defendant but are only directors. The minority shareholders of the third defendant are calling an EGM to remove the plaintiffs as directors. In consequence the purchase of the 51% shares is important to the plaintiff to control the third defendant as the second defendant has already been wound up. The plaintiff has tendered a sum to the first defendant purportedly in their exercise of their right under the guarantee to purchase or redeem the shares. This the defendant says is not permissible in law as of right without the full satisfaction of the debt due and owing to the first defendant. And learned counsel for the first and fourth defendants and second defendant relies on the following cases: (a) *Amanah Merchant Bank Bhd v Sumikin Bussan Kaisha Ltd* [1992] 2 MLJ 832; (b) *The Bank of East Asia Ltd v Mody Sonal M & Ors* [2004] 4 SLR 113; (c) *Ong Eng Bing & Anor v Indian Overseas Bank* [1983] 1 MLJ 193; [1982–1983] SLR 132; (d) *Perwira Habib Bank Malaysia Bhd v Lum Choon Realty Sdn Bhd* [2006] 5 MLJ 21; [2005] 4 CLJ 345; (e) *Oriental Wealth (M) Sdn Bhd v RHB Bank Bhd & Ors* [1998] 1 LNS 459; (f) *Maplelee Property Sdn Bhd v Tan Lei Fon* [2005] 3 MLJ 305; [2005] 1 CLJ 599; (g) *AM Securities Sdn Bhd & Anor v Zulkefli Abdul Hamid* [2008] 1 LNS 354; (h) *Wong Ai Sung v Orix Credit Malaysia Sdn Bhd* [2007] 5 MLJ 39; [2007] 4 CLJ 52.

[6] I have read the originating summons, the affidavits and submission of the parties in detail. I take the view that encl 1 must be dismissed my reasons, inter alia, are as follows:

(a) In essence the plaintiff says that they are entitled to compel the first defendant to allow the plaintiff to purchase or redeem the shares. This in my view they can do so either as a principal debtor and/or guarantor provided they are prepared to pay all the sums due and owing pursuant to the deed of indemnity and guarantee. Support for the proposition is found in a number of cases. In *Perwira Habib Bank Malaysia Bhd v Lum Choon Realty Sdn Bhd* [2006] 5 MLJ 21; [2005] 4 CLJ 345 it was stated that redemption is the exercise of the right of the mortgagor to pay off the mortgage debt or charge upon the property and to have the property reconveyed to him free of the mortgage or charge.

(b) In the instant case I do not think only the second defendant as the borrower has a right to redeem the shares as argued by the defendants. The submission of the plaintiff that in England and Singapore, the equity of redemption applies to all the interested parties in the security, including even the guarantors has merits. And I will say it all depends on the facts and provision of the respective agreements. In *Ong Eng Bing & Anor v Indian Overseas Bank* [1983] 1 MLJ 193; [1982–1983] SLR 132 the Singapore Court of Appeal on the facts held:

> The doctrine of trusteeship and equitable ownership applied only as between parties to the contract. This rule could be extended so as to affect the interest of others.

(c) Where the deed of indemnity and guarantee as in the instant case says that the plaintiff had signed the guarantee not merely as surety but a principal debtor and an indemnifier greater rights and obligation may be attached as opposed to guarantee only. I have dealt with this area of law to some extent in *Orix Credit Malaysia Sdn Bhd v M/s Belquip Sdn Bhd & Ors* [2007] 3 MLJ 478; *Tions Hua Kuons* (see *Kwong Yik Bank Bhd*). I do not wish to repeat the same, save to say where the law fails equity may save. In the instant case it may not be proper for the defendants to defeat the legitimate expectation of the plaintiffs taking into consideration that the first defendant is a lender and the plaintiffs are attempting to pay for the value of the shares at the market price. And the acceptance by the first defendant will not only benefit the second defendant but also stop interests etc from running in respect of the second defendants account which the liquidator of the second defendant must give much weight, in favour of the plaintiff, as they also happen to be the guarantors.

(d) In the instant case cl 8 of the guarantee and indemnity state as follows:

> This guarantee and Indemnity shall be in addition to and shall not be in any way prejudiced or affected by any collateral or other security now or hereafter held by he bank for all or any part of the guaranteed sum… The guarantors shall make no claim to such collateral or other security or any

part thereof or any interest therein unless and until the bank shall have received the full amount guaranteed hereunder and that the guarantors have been absolutely discharged and released in accordance with clause 6 thereof.

[7] In law and as per the agreed terms the plaintiffs do not have an unqualified right to purchase or redeem the pledged shares at the redemption price or exercise the rights through a third party purchaser without having paid the entire debt guaranteed by them to the first defendant. However, if the first defendant and/or the liquidator of second defendant unreasonably refuses the law or equity may assist the plaintiff to evade liability and/or sue the first and/or the liquidator of the second defendant who is a court appointed liquidator for damages arising from it inequitable conduct etc (if any) (see Contracts Act 1950). On the facts of the case I do not see why the first defendant or second defendant should resist the plaintiffs' attempt to secure 51% of equity in the third defendant, though the court will not be able to entertain encl 1 as prayed.

[8] *En passant*, I will say in this case the second defendant through the court appointed liquidator should be quick to accept appropriate sum to reduce the liability to the first defendant. And failure by the liquidator may lead to an action for professional negligence. In *Torita Rubber Works Sdn Bhd v Chew Chong Eu* [2009] 5 MLJ 208; [2009] 9 CLJ 280, on the facts of that case, I have made the following observation:

This section in my view to some extent has dealt away with the common law position that courts will be reluctant to interfere with the decision of the liquidator. The statute imposes on the court a duty to interfere when there is a threat of justice, equity and good conscience likely to be compromised by the conduct of the liquidator. The liquidator is under a duty to use his skill, diligence, competence, and knowledge properly attributable to a professional person, and if he so acts, he has fulfilled the statutory duty but that does not necessarily mean the court has no powers to interfere pursuant to s 274 of the CA 1965, but ordinarily it will not do so. It must be emphasised here that a high standard of care is required from a liquidator, since by accepting office, he undertakes duties for reward. It will be always prudent for a liquidator in every case of serious doubt or difficulty in relation to performance of his statutory duties, to submit the matter to court and to obtain its guidance (see *In Re Home and Colonial Co Ltd* [1930] 1 Ch 1029). In *Re Lubin, Rosen and Associates Ltd* [1987] 1 WLR 93, it was held that it is undesirable for a voluntary liquidator to take steps which appear to be designed to secure support for himself and be discouraging to creditors who take a contrary view. A voluntary liquidator ought not to even give the appearance of being one-sided in such matters. A liquidator who does this at least exposes himself to the comment that he does not seem to have full appreciation of his position. The Federal Court in *Vijayalakshmi Devi d/o Nadchatiram v Dr Mahadevan s/o Nadchatriam & Ors* [1995] 2 MLJ 709 was critical when the trial judge had relied on the liquidator and the liquidator seemed to have sided with the respondent

where the liquidator has failed to consider the appellant's right ie her right to share in the company surplus assets etc; Mohamed Dzaiddin FCJ (as he then was) observed:

> According to counsel, the duty of the liquidator was to act impartially and to draw the attention of the court to facts and matters which were material for the court's consideration. We would agree with the above proposition. In *Gooch*'s case (1872) 7 Ch App 207, it was stated that of the most importance that the liquidator should … maintain an even and impartial hand between all individuals whose interests are individuals whose interests are included in the winding up. He should have no leaning for or against any individual whatsoever.
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> From the Federal Court decision, it is quiet clear that a person who holds the status of liquidator, or any persons or its like, whether or not appointed by court, for reward, has a high standard to meet and the court will not ordinarily take the common law position that court will be reluctant to interfere with the decision of such persons.

[9] From the affidavit evidence and the submission I note prima facie the first and second defendant conduct appears to compromise on the issue of justice, equity and good conscience. And in consequence counsel ought to take appropriate instruction from their clients to enable the plaintiff upon terms and payment as deem necessary to acquire 51% of equity in the third defendant, to avoid unnecessary disputes and litigation which may not benefit the parties.

[10] For reasons stated I dismiss the plaintiffs' application. Each party to bear its own cost.

Claim dismissed with parties to bear their own costs.

Reported by Kanesh Sundrum